No. S251392

IN THE SUPREME COURT OF CALIFORNIA

BRUCE L. SCHECHTER, et al.

Defendants and Appellants,

vs.

MONSTER ENERGY COMPANY

Plaintiff and Respondent.

ANSWER BRIEF ON THE MERITS

After a Decision by the Court of Appeal, Fourth Appellate District,
Division Two, Case No. E066267
Riverside County Superior Court, Case No. RIC 1511553
Hon. Daniel A. Ottolia

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I.
ISSUES PRESENTED

In granting Monster Energy Company's petition for review, the Court limited the issues to be briefed as follows:

(1) When a settlement agreement contains confidentiality provisions that are explicitly binding on the parties and their attorneys, and the attorneys sign the agreement under the legend "APPROVED AS TO FORM AND CONTENT," have the attorneys consented to be bound by the confidentiality provisions?

(2) When evaluating the plaintiff's probability of prevailing on its claim under Code of Civil Procedure section 425.16, subdivision (b), may a court ignore extrinsic evidence that supports the plaintiff's claim, or accept the defendant's interpretation of an undisputed but ambiguous fact over that of the plaintiff?

II.
INTRODUCTION

This case is a very public vendetta by a publicly-traded, multi-million-dollar energy drink corporation. Monster Energy Company brings this action against plaintiffs' attorneys who have repeatedly sued the company for defects in their highly-caffeinated drinks that have resulted in the deaths of children

across the country. Under the guise of "enforcing" a confidentiality provision in a settlement agreement to end litigation with the parents of a deceased child—to which the attorneys were neither signatories nor parties—Monster Energy has carried this breach of contract action against the attorneys all the way to this Court—effectively publicizing to all and sundry that it has settled a case with the parents of a 14-year-old child who died after consuming their dangerous products. And, what was the parents' attorney's asserted offense? A month after the settlement, he responded to a question from one reporter that the highly publicized case had settled confidentially, without disclosing the name of the parties or the amount of the settlement. Based on the attorney's response to the reporter, Monster Energy has relentlessly pursued the attorneys, claiming breach of *the parties'* settlement agreement, abandoning any pretense of concern about confidentiality.

This appeal involves the second prong of the anti-SLAPP statute and Monster Energy's burden to establish a probability of prevailing on the merits of its breach of contract claim against the attorneys. (Code Civ. Proc., § 425.16, subd. (b)(1).) As the Court of Appeal properly concluded, Monster Energy failed to meet this burden both as a matter of law and because of the absence of evidence.

As a matter of law, at the time *the parties* entered into the settlement agreement, case law in California and other jurisdictions routinely held (and continues to hold) that an

attorney's signature as an attorney for his or her client under a legend "approved as to form and content" was non-substantive, did not constitute an actionable representation to the other party to the contract, and did not and *could not* contractually bind the attorney to the other party to the contract. Instead, the well-settled law and custom and practice of the legal community established that such a provision indicated only that the parties had been separately advised by counsel, the attorney for each party had reviewed the agreement, in the attorney's opinion the agreement was in proper form and embodied the parties' deal, and the attorney gave his or her professional approval to his or her client for *the client* to execute and become bound to the agreement.

Here, following a mediation, Monster Energy and the deceased child's parents entered into a written settlement agreement that included confidentiality provisions that were signed *only* by the parties to the action. None of the attorneys were parties to the agreement and none signed the agreement as a party—there was not even a line provided for attorney initials for the confidentiality provisions. In conformity with the common understanding and practice of the legal community as to the effect of "approved as to form and content," the attorneys only approved the form and content of the settlement agreement for their clients' signatures. By this approval, the attorneys did not agree to be contractually bound to Monster Energy. Allowing an entity to enforce all or part of a settlement agreement against an attorney approving solely as to form and content would be a sea change in

the law.

None of the attorneys agreed to be contractually bound to the parties by approving the settlement agreement for their clients' signatures, or in any other manner. California case law provides that consent to be bound by an agreement requires an *objective outward manifestation of consent that is communicated to the other party to the contract.* Apart from the attorney's signature approving the agreement "as to form and content," which does not constitute consent to be contractually bound as a matter of law, Monster Energy presented *no* evidence that the attorneys outwardly manifested any consent to be contractually bound to the settlement agreement communicated to Monster Energy prior to or during the signing of the settlement agreement. Nor could Monster Energy ever produce any such evidence, because the words and conduct of attorneys and clients at a mediation at which a settlement was initially reached, are protected by the unqualified mediation privilege.

In addition, Monster Energy's assertion that it submitted ambiguous extrinsic evidence strays far afield. This case is not about the interpretation of ambiguous provisions in a written settlement agreement to which all parties agree they have consented. To the contrary, this case is about consent to be contractually bound at all. Monster Energy failed to present a shred of the required objective evidence of the attorneys' outward manifestation of consent communicated to Monster Energy prior

to or during the signing of the settlement agreement. That the attorneys knew the settlement agreement was confidential between the parties is not evidence that *the attorneys consented* to be contractually bound to Monster Energy.

In accord with existing case law and in conformity with the understanding and expectations of the legal community, the Court of Appeal properly concluded that, although the attorneys had ethical and professional obligations to maintain the confidentiality of the terms of their clients' settlement, the attorneys' approval of the settlement agreement "as to form and content" in their capacity as attorneys representing their clients did not constitute the attorneys' consent to be contractually bound to Monster Energy. Monster Energy failed to submit any other evidence of consent. For these reasons, Monster Energy failed to establish a probability of prevailing on its breach of contract cause of action against the attorneys.

Accordingly, this Court should affirm the judgment of the Court of Appeal ordering the trial court to grant the attorneys' anti-SLAPP motion in full.

III.
FACTUAL AND PROCEDURAL BACKGROUND

On December 23, 2011, 14-year-old Anais Fournier of Maryland died from cardiac arrythmia due to caffeine toxicity after

drinking two 24-ounce Monster Energy drinks containing 480 milligrams of caffeine—the equivalent of 14 cans of Coke. (CT 37.)[1] Months thereafter, the death of Anais was still being widely reported in the media. (See, e.g., CT 37-40.)

On October 17, 2012, Anais's parents, Wendy Crossland and Richard Fournier, filed a products liability and wrongful death action against Monster Energy in Riverside County, where Monster Energy is headquartered. (Aug. 2.)

On July 29, 2015, shortly before trial and during a mediation, Anais's parents and Monster Energy settled the litigation. (Aug. 2; RB 7.) At the time of the settlement, attorneys Michael E. Blumenfeld and Jonathan Singer of the Maryland law firm of Miles & Stockbridge P.C. and local counsel Bruce Schechter of the Parris Law Firm[2] represented Anais's parents. (SSCT 31-33.) Apparently, the Miles & Stockbridge Maryland law firm were the parents' primary attorneys, because the written settlement agreement directed the settlement funds to be paid to Miles &

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[1] CT refers to the Clerk's Transcript. Aug. refers to the Augmented Record. SSCT refers to the Sealed Supplemental Clerk's Transcript. Opn. refers to the Court of Appeal Opinion. RB refers to Monster Energy's Respondent's Brief in the Court of Appeal. PRH refers to Monster Energy's Petition for Rehearing in the Court of Appeal. OBOM refers to Monster Energy's Opening Brief on the Merits in this Court. ABOM refers to this Answer Brief on the Merits.

[2] The Parris Law Firm was formerly known as the R. Rex Parris Law Firm.

Stockbridge P.C. (SSCT 24.) After the mediation, Attorney Blumenfeld for Anais's parents and Monster Energy's attorney exchanged a number of different drafts of a written settlement agreement. (CT 115.) It was attorney Blumenfeld who spoke with Anais's parents about their obligations concerning the confidentiality provisions of the settlement agreement. (CT 117.)

Crossland and representatives of Monster Energy executed a written "Confidential Settlement Agreement and Release" ("Settlement Agreement") on August 3, 2015, and Fournier executed the Settlement Agreement the next day on August 4, 2015. (SSCT 31-32.) On August 4, 2015, the Settlement Agreement also was "approved as to form and content" by Attorney Blumenfeld of Miles & Stockbridge P.C. as attorneys for the plaintiffs. (SSCT 31.) And on August 5, 2015, the Settlement Agreement was "approved as to form and content" by Monster Energy's attorney as attorneys for the defendants. (SSCT 33.) The Settlement Agreement was also "approved as to form and content" by Attorney Schechter of the Parris Law Firm as attorneys for the plaintiffs, but his signature is undated. (SSCT 33.)

The Settlement Agreement defined the Parties to the agreement as the actual plaintiffs and defendants in the lawsuit—Crossland, Fournier and Monster Energy—and provided that the Settlement Agreement was effective as of the date it was *signed by the Parties*. (SSCT 22, 30.) The Settlement Agreement did not require the Parties' attorneys' approval in order to be effective.

Thus, the effective date of the Settlement Agreement was August 4, 2015, the date of Fournier's signature, the last Party to sign.

The Settlement Agreement included confidentiality and non-disparagement provisions. Specifically, section 11.1 of the Settlement Agreement required confidentiality for the existence, amount, terms and conditions of the settlement. (Opn. 4.)[3] Section 11.3 limited comments on the settlement to "This matter has been resolved" or "words to their effect." (Opn. 5; SSCT 28.) Section 11.4 included a standard non-disparagement provision but excluded from the confidentiality and disparagement provisions statements by the parents' attorneys in connection with other or future litigation against Monster Energy. (Opn. 5.)

Pursuant to the Settlement Agreement, a couple of weeks later, Crossland and Fournier dismissed their complaint against Monster Energy.

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[3] The unredacted Settlement Agreement was filed under seal in the trial court. (CT 84-85.) On August 13, 2018, the Court of Appeal unsealed the Settlement Agreement to the extent it was quoted in the Court of Appeal Opinion: "All portions of the settlement agreement that are quoted in this court's opinion are unsealed. However, the physical settlement agreement shall remain sealed, as the quotations in the court's opinion are sufficient to identify [and] to disclose to the public the unsealed portions." (Court of Appeal docket.) Following Monster Energy's lead (see OBOM 13-14, 21-22), Attorneys refer to portions of the Settlement Agreement in this Answer Brief on the Merits that were not quoted in the Opinion but bear no indicia of confidentiality, such as the amount of the settlement.

On September 15, 2015, an online newspaper published on its website a reporter's September 4, 2015 interview of Attorney Schechter, which included alleged statements by Schechter in response to questions confirming that litigation involving a 14-year-old who died after drinking Monster Energy's drinks had been confidentially resolved for "substantial dollars." (Aug. 4; CT 45, 97, 154.) Attorney Schechter's response to the reporter's questions did not include any names or any specific settlement amounts. (Aug. 4; CT 45, 97, 154.) Attorney Schechter also allegedly discussed with the reporter other litigation he was handling against Monster Energy and in that connection allegedly opined on the health issue that the synergistic effects of the ingredients in Monster Energy's drinks made them deadly. (Aug. 4.)

Ten days later, Monster Energy sued Attorney Schechter and his law firm (the "Attorneys") for breach of the Settlement Agreement, breach of the implied covenant, unjust enrichment, and promissory estoppel. (Aug. 1.) The Attorneys filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16. (CT 1.) Monster Energy opposed the motion. (CT 88.)

With respect to the second prong of the anti-SLAPP statute and its burden of establishing a probability of prevailing on the merits, Monster Energy relied almost exclusively on the provisions of the Settlement Agreement and Attorney Schechter's

signature under the legend "approved as to form and content." Monster Energy submitted as evidence only the Settlement Agreement, the reporter's article, the reporter's deposition testimony and her affidavit, and deposition testimony of Attorney Schechter. (CT 93, fn. 1, 112-154.) Specifically, Monster Energy argued the Attorneys were bound by the Settlement Agreement based solely on the language of the Settlement Agreement, the Attorneys' "approval as to form and content," Attorney Schechter's review of the Settlement Agreement, Attorney Schechter's understanding that Monster Energy would not settle if *Anais's parents* did not agree to keep the settlement confidential, and Attorney Schechter's statement to the reporter that he could not reveal the terms of the settlement. (CT 103-105.)

The trial court granted the Attorneys' motion to strike the breach of the implied covenant, unjust enrichment and promissory estoppel causes of action, but denied the motion as to the breach of the Settlement Agreement, concluding Monster Energy had met its burden to show a probability of prevailing on the merits of its contract cause of action. (CT 196.) The Attorneys appealed from the order to the extent it denied their motion to strike the breach of the Settlement Agreement cause of action. (CT 198.) Monster Energy did not cross-appeal.

In its Respondent's Brief on appeal, Monster Energy never argued it had satisfied its evidentiary burden to establish the Attorneys' consent with "extrinsic evidence," and instead relied

entirely on the Settlement Agreement and Attorney Schechter's signature under the legend "approved as to form and content." The Court of Appeal reversed the denial of the anti-SLAPP motion on breach of contract as to this ground. (Opn. 21-22.) The Court of Appeal concluded there was no evidence the Attorneys agreed to be contractually bound by the Settlement Agreement and "approval as to form and content" did not constitute the Attorneys' consent to be contractually bound to Monster Energy. (Opn. 13-21.)

IV.
LEGAL ARGUMENT

A. Monster Energy Failed to Demonstrate A Probability Of Prevailing On Its Breach Of Contract Claim Or That Its Claim Had Even Minimal Merit

Monster Energy failed to persuade the Court of Appeal and fails to persuade in its Opening Brief on the Merits in this Court that it met its burden under the second prong of the anti-SLAPP statute (Code Civ. Proc., § 425.16, subd. (b)(1)) to present evidence that its breach of contract cause of action against the Attorneys was legally sufficient and had at least minimal merit. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819-820 (*Oasis*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (*Navellier*) [in opposing an anti-SLAPP motion, a plaintiff must demonstrate its cause of action is legally sufficient and supported by a prima-facie showing].) Monster Energy presented not a

scintilla of evidence that the Attorneys consented to be contractually bound to Monster Energy. An appellate court reviews an order granting an anti-SLAPP motion de novo. (*Oasis*, *supra*, 51 Cal.4th at p. 820.)

To begin, an attorney's approval of an agreement for a client "as to form and content" does not constitute the attorney's consent to be contractually bound to the other party. (ABOM, IV, B.) Second, Monster Energy presented no evidence of any outward manifestation of the Attorneys' consent to be bound that was communicated to Monster Energy. (ABOM, IV, D.) Third, the Attorneys were not Parties to the Settlement Agreement pursuant to the express provisions of the agreement. (ABOM, IV, E.) Fourth, the mediation privilege precludes Monster Energy from disclosing any words or conduct of the Attorneys, or inferences therefrom, that occurred in connection with the mediation. (ABOM, IV, G.) Fifth, Monster Energy presented no clear and compelling evidence that the Attorneys voluntarily relinquished their First Amendment right to speak. (ABOM, IV, C.) Sixth, the Attorneys did not sign a writing as a Party that would satisfy the statute of frauds. (ABOM, IV F.) Finally, Monster Energy has waived its argument that extrinsic evidence was admissible and, in any event, presented no evidence (extrinsic or otherwise) that demonstrated an outward manifestation of the Attorneys' consent to be bound that was communicated to Monster Energy at the time of the Settlement Agreement. (ABOM IV, G.)

Contrary to Monster Energy's argument, there is no evidence that the Attorneys being sued negotiated the Settlement Agreement. To the contrary, the only evidence is that it was negotiated between Monster Energy's attorney and Anais's parents' Maryland attorneys. (CT 115.) As Attorney Schechter stated, and the Court of Appeal agreed, the Settlement Agreement was confidential and the Attorneys had ethical and professional obligations to maintain its confidentiality—but the Attorneys did not owe contractual obligations to Monster Energy. (Opn. 16 & fn. 2.) Simply put, Monster Energy's breach of contract cause of action is legally insufficient as a matter of law—there is no conflicting evidence and there are no conflicting inferences, and the Court of Appeal made no credibility determinations.

B. The Attorneys' Signature On The Settlement Agreement Under The Legend "Approved As To Form And Content" Does Not Constitute Consent To Be Contractually Bound To Monster Energy

In accord with existing case law in California and other jurisdictions, the Court of Appeal concluded that, when an attorney approves an agreement as to form and content, the attorney is not agreeing to be contractually bound. (Opn. 17-20.) Specifically, the Court of Appeal held: "The only reasonable construction of this wording ["Approved as to form and content"] is that [the Attorneys] were signing solely in the capacity of attorneys who had reviewed the settlement agreement and had given their clients their professional approval to sign it. In our experience,

this is the wording that the legal community customarily uses for this purpose." (Opn. 17.)

In reaching this conclusion, the Court of Appeal relied primarily on two cases, one from California and the other from the Nebraska Supreme Court—each case concluding that an attorney's signature under the legend "approved as to form and content" does not bind the attorney to the agreement. There is no conflict in the law.

In *Freedman* v. *Brutzkus* (2010) 182 Cal.App.4th 1065, 1068 (*Freedman*), the parties were attorneys who had represented opposing clients (licensors and an apparel manufacturer) in negotiating a trademark license agreement. (*Ibid.*) The license agreement included a signature block for the attorneys under the legend approved as to form and content. (*Ibid.*) A dispute later arose between the licensors and the apparel manufacturer, which declared bankruptcy after entering into the agreement. (*Ibid.*) The licensors, previously represented by the apparel manufacturer's attorney in other matters, alleged they had relied on the apparel manufacturer's attorney's representation that the manufacturer would be able to pay them. (*Ibid.*) The apparel manufacturer's attorney then brought suit against the licensors' attorney, alleging that in approving the agreement as to form and content, the licensors' attorney had made an actionable misrepresentation to him regarding the agreement's accuracy. (*Ibid.*)

The *Freedman* Court of Appeal affirmed the trial court's dismissal on demurrer and rejected the apparel manufacturer attorney's argument, explaining, "the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for this particular party, and that the document is in the proper form and embodies the deal that was made between the parties." (*Freedman, supra,* 182 Cal.App.4th at p. 1070.) Further, "this recital indicates that an attorney has advised or is advising his or her own client of the attorney's approval of the document's form and content, and does not, by itself, operate as a representation to an opposing party's attorney that can provide a basis for tort liability." (*Id.* at p. 1067.) Such an approval is given solely to the attorney's client. (*Id.* at p. 1070.) "An attorney cannot approve an agreement or give a legal opinion on behalf of an opposing party." (*Ibid.*) Holding an attorney liable to the opposing party under these circumstances "would upend the meaning of a common legal practice, and potentially interfere with attorneys' absolute duty of loyalty to their own clients." (*Id.* at p. 1071, citing *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg* (1994) 30 Cal.App.4th 1373, 1383 ["'Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved.' [Citation.]"].)

Similarly, in *RSUI Indem. Co. v. Bacon* (2011) 282 Neb. 436, 437-38 [810 N.W.2d 666] (*RSUI*), the Nebraska Supreme

Court applied the reasoning of *Freedman* to a settlement agreement. (*Ibid.*) There, a general contractor entered into a settlement with an injured employee of a subcontractor. (*Id.* at p. 438.) The settlement agreement provided that, in the event the employee subsequently settled with the subcontractor, the employee and his attorney would pay the general contractor's insurer a specified amount. (*Id.* at pp. 437-438.) The employee's attorney signed the settlement agreement under a legend "Agreed to in Form & Substance." (*Id.* at p. 438.) Later, the employee received a settlement from the subcontractor but neither the employee nor the employee's attorney paid the general contractor's insurer the specified amount. (*Id.* at p. 439.) The insurer then sued the employee and the employee's attorney for breach of contract and obtained a judgment against them. (*Ibid.*) The Nebraska Supreme Court reversed the judgment against the attorney, explaining the attorney's "signature under the legend 'Agreed to in Form & Substance' demonstrates only that he was [the employee's] attorney and that 'the document [was] in the proper form and embodie[d] the deal that was made between the parties.'" (*Id.* at pp. 440-444.)

Cases in other contexts have similarly construed the language "approved as to form and content" as a non-substantive provision indicating that the client is represented by counsel and, counsel has approved the content of the document as to the client's interests, and any agreement was reached on an arms-length basis. (See *In re Marriage of Hasso* (1991) 229 Cal.App.3d 1174,